

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Nora Mead Brownell, and Suedeene G. Kelly.

Trans-Elect NTD Path 15, LLC

Docket No. ER05-17-001

ORDER DENYING REHEARING

(Issued April 13, 2006)

1. On November 17, 2005, the Commission issued an order in *Trans-Elect NTD Path 15, LLC*,<sup>1</sup> finding that Trans-Elect NTD Path 15, LLC's (NTD Path 15) owners have an actual or potential income tax liability on the income from NTD Path 15 and accepting NTD Path 15's compliance filing, thus permitting NTD Path 15 to include a tax allowance in its rates (more formally referred to as the NTD Path 15 transmission revenue requirement (revenue requirement)). On December 16, 2005, the Transmission Agency of Northern California (TANC), the City of Santa Clara, California, d/b/a Silicon Valley Power (Santa Clara), the City of Redding, California (Redding), and M-S-R Public Power Agency (MSR Public Power) (collectively Intervenors) filed a request for rehearing of that order. This order denies that request for rehearing.

**Background**

2. In May 2001, the United States Secretary of Energy authorized the Western Area Power Administration (Western) to explore ways to relieve capacity constraints on Path 15.<sup>2</sup> Western chose Trans-Elect Inc. (Trans-Elect) and Pacific Gas & Electric Company (PG&E) to build an 83-mile, 500 kV transmission line within the existing Path 15 transmission corridor and make related modifications to PG&E's Los Banos and Gates substations (Path 15 Upgrade) in order to increase Path 15's transmission capacity.<sup>3</sup>

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<sup>1</sup> 113 FERC ¶ 61,162 (2005) (*Trans-Elect*).

<sup>2</sup> See *Western Area Power Admin.*, 99 FERC ¶ 61,306 at 62,277-78 (June 12 Order), *reh'g denied*, 100 FERC ¶ 61,331 (2002).

<sup>3</sup> See *id.* at 62,278.

3. Trans-Elect agreed to be fully responsible for the construction, replacement, and maintenance costs of the 500 kV transmission line upgrade to Path 15.<sup>4</sup> In order to develop, construct, and operate the upgrade to Path 15, Trans-Elect created NTD Path 15, a limited liability company (a subsidiary pass-through entity).<sup>5</sup>

4. On October 4, 2004, in order to recover its investment costs related to the Path 15 Upgrade, NTD Path 15 filed its Revenue Requirement and Transmission Owner Tariff. In an order issued on December 2, 2004,<sup>6</sup> the Commission accepted that filing and suspended it for a nominal period (to become effective upon the commencement of the commercial operation of the Path 15 Upgrade), subject to refund and to the outcome of the Commission's *Inquiry Regarding Income Tax Allowance*.<sup>7</sup> On December 22, 2004, the California Independent System Operator (CAISO) notified the Commission that the Path 15 Upgrade achieved commercial operation on that day.

5. In the May 4 Order, the Commission stated that it would permit NTD Path 15 to retain an income tax allowance if it could demonstrate that NTD Path 15 meets the standard set out in the *Policy Statement* and directed NTD Path 15 to make a compliance filing to that effect.<sup>8</sup> In the *Policy Statement*, the Commission concluded that it would "permit an income tax allowance for all entities or individuals owning public utility assets [including pass-through entities, such as NTD Path 15] provided that an entity or individual has an actual or potential income tax liability to be paid on that income from those assets."<sup>9</sup>

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<sup>4</sup> See Letter Agreement between the Path 15 Upgrade Participants, Docket No. ER02-1672-000 at 13-14 (Apr. 30, 2002) (Letter Agreement); see also June 12 Order, 99 FERC ¶ 61,306 at 62,278 (accepting the Letter Agreement, which, among other things, set forth the rate principles for the recovery of costs associated with the Path 15 Upgrade).

<sup>5</sup> *Trans-Elect*, 113 FERC ¶ 61,162 at P 3. In "pass-through" entities, such as a limited liability company, profits and losses pass directly through to an owner's income tax return.

<sup>6</sup> *Trans-Elect NTD Path 15, LLC*, 109 FERC ¶ 61,249 at P 29 (2004) (December 2 Order), *reh'g denied*, 111 FERC ¶ 61,140 (2005) (May 4 Order), *order on compliance filing*, 112 FERC ¶ 61,202 (2005) (August 19 Order).

<sup>7</sup> 111 FERC ¶ 61,139 (2005) (*Policy Statement*).

<sup>8</sup> See May 4 Order, 111 FERC ¶ 61,140 at P 16 (*citing Policy Statement*, 111 FERC ¶ 61,139 at P 32).

<sup>9</sup> *Policy Statement*, 111 FERC ¶ 61,139 at P 32.

6. On June 2, 2005, NTD Path 15 filed its First Compliance Filing, as directed by the May 4 Order. That filing included four affidavits (one for each of the four individual equity owners (Equity Owners) of NTD Path 15).<sup>10</sup> The affidavits were intended to demonstrate that each Equity Owner has an actual or potential tax liability associated with its imputed share of NTD Path 15's income. In the August 19 Order, the Commission found that NTD Path 15's compliance filing did not satisfy the standard set forth in the Policy Statement (i.e., a demonstration of actual or potential tax liability).<sup>11</sup> Therefore, the Commission required NTD Path 15 to provide, in a further compliance filing, additional information to demonstrate that the Equity Owners indeed have an actual or potential taxable income attributable to NTD Path 15's income.<sup>12</sup> To meet this requirement, the Commission directed NTD Path 15 to provide documentation demonstrating:

- (1) the projected distributive share of corporate income (positive or negative) from NTD Path 15 that will be attributed to each Equity Owner;
- (2) that each of the Equity Owners has a projected taxable income level from all income sources that would result in each of them being subject to the 35 percent marginal corporate income tax bracket; and (3) that each Equity Owner is, for federal tax purposes, either automatically classified as a corporation or has elected to be taxed as a corporation and, therefore, will file a corporate income tax return, Form 1120.<sup>13</sup>

7. On September 19, 2005, NTD Path 15 submitted its Second Compliance Filing. The Second Compliance Filing provided additional information in response to the three issues that the Commission raised in the August 19 Order.<sup>14</sup>

8. In response to the first issue (*i.e.*, the Equity Owners' projected distributive shares of corporate income), NTD Path 15 submitted, in Attachment A-1 and A-2 to its Second

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<sup>10</sup> The Equity Owners collectively represent 100 percent of the ownership interests in NTD Holdings LLC, which, in turn, is the 100 percent owner of NTD Path 15. The four individual Equity Owners are: EIF Path 15 Funding LLC, KB Transmission LLC (KB Transmission), Cardinal Power Funding, LLC, and New Transmission Development Company.

<sup>11</sup> See August 19 Order, 112 FERC ¶ 61,202 at P 9.

<sup>12</sup> *Id.* at P 10.

<sup>13</sup> *Id.* (footnote omitted).

<sup>14</sup> See *id.*

Compliance Filing, documentation to show that the income that NTD Path 15 distributes to each of the Equity Owners on a pro rata basis is based on each Equity Owner's ownership interests in NTD Holdings LLC.<sup>15</sup> The documentation listed each of the Equity Owner's projected allocation of corporate income from NTD Path 15.

9. As for the second issue (*i.e.*, the Equity Owners' projected taxable income levels), NTD Path 15 submitted, in Attachment B to its filing, each Equity Owner's projected federal taxable income level from NTD Path 15 for the 2005 test year (excluding deductions, credits, losses, etc.). NTD Path 15 stated that the information provided in Attachment B demonstrated that NTD Path 15's aggregate public utility income is subject to federal income tax liability at the marginal tax rate of 35 percent.

10. Finally, with respect to the third issue (*i.e.*, the Equity Owners' corporate income tax returns), NTD Path 15 maintained that the supporting documentation that it filed, in Attachment C to its filing, showed that each Equity Owner had elected to be taxed as a corporation for federal tax purposes and, in turn, will have its income reported on Form 1120.

11. On October 12, 2005, NTD Path 15 filed a correction to one of the affidavits (Corrected Affidavit Filing) that it filed in its First Compliance Filing. NTD Path 15 explained that the affidavit that KB Transmission provided incorrectly identified K B Transmission as the entity responsible for filing a Form 1120. The corrected affidavit stated that Transvalley LLC is, in fact, the tax filing entity. The affidavit stated that: "KB Transmission LLC is wholly owned by Transvalley, LLC. Transvalley, LLC is required by federal law to file Form 1120. In accordance with this requirement, Transvalley, LLC must report KB Transmission LLC's imputed income associated with Trans-Elect NTD Path 15's public utility income."<sup>16</sup>

12. In *Trans-Elect*, the Commission found that the information NTD Path 15 provided in the Second Compliance Filing and the Corrected Affidavit Filing demonstrated, consistent with the Commission's directives in the August 4 Order: (1) the Equity Owners' projected distributive shares of corporate income; (2) the Equity Owners' projected taxable income levels; and (3) the tax status of the entities that have the ultimate tax liability with respect to the income that is imputed to the Equity Owners from NTD Path 15's income (*i.e.*, their Form 1120 tax returns). Based on that information, the Commission found that NTD Path 15 had demonstrated that its owners have an actual or potential income tax liability associated with their imputed share of NTD Path 15's income. Since NTD Path 15 had satisfied the standard set forth in the

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<sup>15</sup> See *Id.* at P 19.

<sup>16</sup> *Trans-Elect*, 113 FERC ¶ 51,162 at P 13.

Policy Statement for a pass-through entity, such as NTD Path 15, to include a tax allowance in its rates, the Commission, consistent with the May 4 Order, permitted NTD Path 15 to include an income tax allowance in its revenue requirement. The income tax allowance reflected NTD Path 15's income imputed to the Equity Owners.<sup>17</sup>

### **Intervenors' Request for Rehearing**

13. Intervenors argue that the Commission erred in allowing NTD Path 15 to include imputed income taxes in its revenue requirement based on the *Policy Statement* because, according to Intervenors, the *Policy Statement* contradicts the court's decision in *BP West Coast Products, LLC v. FERC*.<sup>18</sup> Intervenors maintain that the court in *BP West Coast* held that if a regulated entity does not generate a tax, either standing alone or as part of a corporate group, the Commission cannot create a phantom tax in order to enable the entity to pass a tax allowance through to rate payers.<sup>19</sup> Intervenors quote the court's language to the effect that the Commission may not "create tax liability when neither an actual nor estimated tax is ever going to be paid or incurred on the income of the utility in the ratemaking proceeding."<sup>20</sup>

14. Intervenors note that in *BP West Coast* the court vacated the tax allowances portion of the Commission's *SFPP* Opinions allowing recovery of income taxes that a utility did not itself pay.<sup>21</sup> Intervenors maintain that the Commission erred in allowing NTD Path 15 to include imputed income taxes in its revenue requirement based on the *Policy Statement*, because the *Policy Statement* does not take into account the *BP West Coast* court's overarching concern with tax allowances and fails to follow the court's proscription against allowing public utilities that do not themselves pay income taxes to pass through tax allowances to ratepayers.<sup>22</sup>

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<sup>17</sup> May 4 Order, 111 FERC ¶ 61,140 at P 16.

<sup>18</sup> 374 F. 3d 1263 (D.C. Cir. 2004) (*BP West Coast*).

<sup>19</sup> Rehearing at 13

<sup>20</sup> *Id.*, quoting *BP West Coast*, 374 F.3d at 1292.

<sup>21</sup> *BP West Coast* reviewed four Commission orders: *SFPP, L.P.*, Opinion No. 435, 86 FERC ¶ 61,022 (1999); *SFPP, L.P.*, Opinion No. 435-A, 91 FERC ¶ 61,135 (2000); *SFPP, L.P.*, Opinion No. 435-B, 96 FERC ¶ 61,281 (2001); and *SFPP, L.P.*, 97 FERC ¶ 61,138 (2001) (*SFPP* Opinions).

<sup>22</sup> Rehearing at 11.

15. Intervenor quote the court's conclusion in *BP West Coast* that: "where there is no tax generated by the regulated entity, either standing alone or as part of a consolidated corporate group, the regulator cannot create a phantom tax in order to create an allowance to pass through to the ratepayer."<sup>23</sup> Intervenor maintain that the Commission erred in establishing rates for NTD Path 15 based on the tax liability of the owners of a pass-through entity, instead of establishing rates based on taxes that the jurisdictional public utility itself owes.<sup>24</sup>

16. Intervenor read the *Policy Statement* as deciding that because owners of a pass-through entity pay taxes as a result of their affiliation with a jurisdictional entity, the Commission should allow the public utility to recover taxes based on the tax liability of the individual owners. In Intervenor's view, the Commission is mistakenly focusing on who pays the taxes, rather than on what taxes the jurisdictional entity does (or does not) pay, and is ignoring the *BP West Coast* court's prohibition against allowing regulated utilities to collect phantom taxes.<sup>25</sup>

17. Intervenor maintain that, because NTD Path 15 is organized as an LLC, it is not liable for income taxes under the Internal Revenue Code and will never pay either actual or estimated income taxes on its income. Intervenor argue that, by allowing NTD Path 15 to include a tax liability in its revenue requirement, the Commission acted directly contrary to the court's admonition in *BP West Coast* that the Commission should not "create tax liability when neither an actual nor estimated tax is ever going to be paid or incurred on the income of the utility in the ratemaking proceeding."<sup>26</sup> Intervenor submit that, because NTD Path 15 is not liable for income taxes as a result of its business structure, it is not entitled to an allowance for income taxes under the *BP West Coast* decision. Intervenor conclude that the Commission erred in establishing rates for NTD Path 15 that directly conflict with the court's decision in *BP West Coast*.<sup>27</sup>

18. Intervenor further fault the Commission for allowing NTD Path 15 to recover costs that it has not incurred.<sup>28</sup> They argue that in Order No. 144<sup>29</sup> the Commission

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<sup>23</sup> *Id.* at 12, quoting *BP West Coast*, 374 F. 3d at 1291.

<sup>24</sup> Rehearing at 12.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 12-13, quoting *BP West Coast*, 374 F. 3d at 1292.

<sup>27</sup> *Id.* at 13.

<sup>28</sup> *Id.* at 14.

adopted the “actual taxes paid” doctrine, and held that public utilities should allocate all costs among customers over time, in a manner that matches the burdens of costs with the benefits received.<sup>30</sup> According to Intervenor, in Order No. 144, the Commission decided that a regulated entity may not collect through the tax component of its cost-of-service an amount greater than the taxes it will actually pay.<sup>31</sup> Intervenor argues that, under the “actual taxes paid” principle, the Commission should not allow NTD Path 15 to include income taxes within its cost of service, because, under its business structure, it completely avoids liability for income taxes.<sup>32</sup>

19. Intervenor also claim that allowing NTD Path 15 to pass through an allowance for income taxes violate the principle of cause causation because, since NTD Path 15 will never pay taxes because of its business form, its customers could not possibly cause it to incur tax liability. They conclude that, since customers are only responsible for the actual costs of the utilities’ facilities used to provide service, and since, because of its business form, NTD Path 15’s facilities can never be responsible for taxes, NTD Path 15’s customers can never cause it to incur taxes and shouldn’t have to pay taxes in their rates.

20. Intervenor note that, as separate tax entities, corporations are taxed on their income. Shareholders then pay taxes on the dividends that they receive from the corporation. But, as a pass-through entity for tax purposes, NTD Path 15 pays no corporate taxes. It is the partners, with whom the tax liability lies, that are responsible for paying the taxes. Intervenor argue that the customers of pass-through tax entities should not be responsible for paying phantom taxes that the regulated entity will never owe. According to Intervenor, this lack of tax liability is a product of the corporate form that NTD Path 15 has selected.<sup>33</sup> Intervenor conclude that it was error for the Commission to allow NTD Path 15 to recover income taxes in its revenue requirement even though NTD Path 15 will never owe income taxes, and will, thus, collect more from its customers than its actual costs.

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<sup>29</sup> Order No. 144, *Regulations Implementing Tax Normalization for Certain items Reflecting Timing differences in the Recognition of Expenses or Revenues for Ratemaking and Income Tax Purposes*, FERC Stats. & Regs. Regulations Preambles 1977-1981 ¶ 30,254, *reh’g denied*, Order No. 144-A, FERC Stats. & Regs. Regulations Preambles 1982-1985 ¶ 30,340, *aff’d*, *Public Systems v. FERC*, 709 F.2d 73 (D.C. Cir. 1983) (Order No. 144).

<sup>30</sup> Rehearing at 14.

<sup>31</sup> *Id.* citing Order No. 144, FERC Stats. & Regs. ¶30,254 at 31,532.

<sup>32</sup> Rehearing at 14-15.

<sup>33</sup> *Id.* at 16, citing *BP West Coast* at 1291.

## **Discussion**

21. Intervenor's principal argument is that the *Policy Statement* contradicts *BP West Coast*. The Commission addressed this issue in the *Policy Statement*, which arose out of the court remand in *BP West Coast*. In the *Policy Statement*, the Commission considered: (a) each of the court's reasons for rejecting the Commission's prior approach to the eligibility of partnerships for income tax allowances, known as the Lakehead policy;<sup>34</sup> and (b) the effect of denying the pass-through of tax allowances on long-term investment in energy projects.<sup>35</sup> The Commission noted that investors use partnerships and other pass-through entities pervasively in the gas pipeline and electric industries.<sup>36</sup>

22. The Commission concluded that it should permit an income tax allowance for all entities or individuals owning public utility assets, provided that an entity or individual has an actual or potential income tax liability on the income from those assets. Thus, the Commission decided that it would permit a tax-paying corporation, a partnership, a limited liability corporation, or other pass-through entity an income tax allowance on the income imputed to the corporation, or to the partners, or to the members of pass-through entities, provided that the corporation or the partners or the members have an actual or potential income tax liability on that public utility income.<sup>37</sup>

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<sup>34</sup> In *Lakehead Pipe Line Company, L.P.*, 71 FERC ¶ 61,388 (1995), *reh'g denied*, 75 FERC ¶ 61,181 (1996) (*Lakehead*), the Commission permitted a limited partnership to include an income tax allowance in its rates equal to the proportion of its limited partnership interests owned by corporate partners, but did not allow it to include a tax allowance for its partnership interest that corporations did not own. For a discussion of the Commission's reasons for the Lakehead policy and the court's rejection of those reasons, see *Policy Statement*, 111 FERC ¶ 61,139 at PP 2-5.

<sup>35</sup> *Policy Statement*, 111 FERC ¶ 61,139 at P 2. In its Notice of Inquiry regarding income tax allowances, the Commission asked, among other things, if: (a) the court's decision precludes an income tax allowance for a partnership or other ownership interests, will this result in insufficient incentives for investment in energy infrastructure; (b) or will the same amount of investment occur through other ownership arrangements; and (c) are there other methods of earning an adequate return that are not dependent on the tax implications of a particular capital structure? *Id.*

<sup>36</sup> *Policy Statement*, 111 FERC ¶ 61,139 at P 31. The Commission also noted the "substantial amount of existing investment at issue in this proceeding." *Id.* n.30.

<sup>37</sup> *Id.* at P 32.



23. The Commission stressed that any pass-through entity seeking an income tax allowance in a specific rate proceeding must establish that its partners or members have an actual or potential income tax obligation on the entity's public utility income. The Commission specified that if any of the partners or members do not have such an actual or potential income tax obligation, the Commission would reduce the amount of any income tax allowance to reflect the weighted income tax liability of the entity's partners or members.<sup>38</sup>

24. In reaching this decision, the Commission directly addressed both the phantom tax issue that Intervenor raise and the court remand in *BP West Coast*. The Commission concluded that permitting corporations, partnerships and other pass-through entities an income tax allowance does not result in a so-called "phantom tax." This is because, while the pass-through entity does not itself pay income taxes, the owners of the pass-through entity pay income taxes or incur income tax liability on the utility income that the assets that they own generate. The Commission concluded that the taxes that the actual or potential tax liability that owners of the pass-through entity pay are just as much a cost of acquiring and operating the assets of that entity as if a corporation owned the utility assets.<sup>39</sup>

25. The Commission noted that the *BP West Coast* court did not have before it at the time of its decision a thorough discussion of the realities of partnership tax practice. The Commission considered the court's concern that, in its prior orders, the Commission had created a tax allowance to compensate for an income tax cost that a regulated utility does not pay (the so-called "phantom tax"). The Commission concluded that permitting corporations, partnerships, and other pass-through entities a tax allowance does not raise this concern, because the public utility income of pass-through entities is attributable directly to the owners of such entities and the owners have an actual or potential income tax liability on that income. The Commission observed that the reality is that, just as a corporation has an actual or potential income tax liability on income from the first tier public utility assets that it controls, so, also, the owners of a partnership of an LLC have an actual or potential tax liability on the income from the pass-through entity.<sup>40</sup>

26. The Commission, therefore, concluded that providing an income tax allowance to partnerships in proportion to the interests owned by entities or individuals with an actual or potential income tax liability does not create a phantom income tax liability. The Commission emphasized that its primary reason for permitting corporations, partnerships

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at P 33.

<sup>40</sup> *Id.*, at P 34.

and other pass-through entities a tax allowance was to recognize in rates the actual or potential income tax liability attributable to regulated utility income.<sup>41</sup>

27. The Commission found that, contrary to intervenors' arguments, the members of a partnership or LLC will incur an actual or potential tax liability on the income that a pass-thru entity generates. The Commission decided that, so long as, in an individual proceeding, it can ensure that the members of a partnership or LLC incur an actual or potential tax liability on the income from a pass-thru entity, permitting a tax allowance to pass-thru entities does not contradict the court's decision in *BP West Coast*.<sup>42</sup>

28. In the *Policy Statement* the Commission referred specifically to Trans-Elect NTD Path 15, as follows:

[T]he owners of Trans-Elect NTD Path 15, LLC, are a Subchapter C corporation (PG&E) and one LLC, Trans-Elect, LLC. If no income tax allowance is permitted on Trans-Elect NTD Path 15's public utility income, the return to the investing entities would be less than if PG&E had invested directly in the line. . . . Having concluded that [allowing pas-through entities an income tax allowance] will not result in phantom income taxes, it is then legitimate to conclude that the result here will facilitate important public utility investments such as that made by Trans-Elect NTD Path 15, LLC in the Path 15 upgrade.<sup>43</sup>

29. Intervenors' other two arguments, that, in permitting a tax allowance to NTD Path 15, the Commission: (a) departed from its "actual taxes paid" principle; and (b) violated the principle of cost causation, are really a reprise of their central "phantom tax" argument. As the court noted in *City of Charlottesville*,<sup>44</sup> the "actual taxes paid" principle is a misnomer, and should be expressed as "actual or estimated taxes paid *or incurred*."<sup>45</sup> In the *Policy Statement* the Commission pointed out that the purpose of the tax allowance is to recognize in rates the actual *or potential* income tax liability

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<sup>41</sup> *Id.* at P 37.

<sup>42</sup> *Id.* at PP 32-34.

<sup>43</sup> *Id.* at PP 35, 37.

<sup>44</sup> *City of Charlottesville, VA v. FERC*, 774 F.2d 1205 (D.C. Cir. 1985) (Scalia, J.) (*City of Charlottesville*).

<sup>45</sup> *Id.* at 1215 (emphasis added).

attributable to regulated utility income.<sup>46</sup> For this reason Intervenor's reliance on Order No. 144 is misplaced. While that Order talks in terms of cash flows, the underlying purpose is to normalize income in a manner that protects the interest of the rate payers. Order No. 144 addresses the basic accounting fact that the recognition of income for tax purposes can be different from that of the recognition of income for regulatory purposes. A regulatory tax allowance is build into the utility's rate and thus the utility collects cash every accounting period regardless of whether the related income is actually recognized, and the tax paid, in the same accounting period. If cash is collected and the tax is not paid in that accounting period, the utility will earn a return (interest) on the funds so collected until the tax obligation is actually paid. Therefore the utility is required to adjust its rate of return to reflect this fact, to place the deferred payments in a balance sheet account, and to amortize the deferral of the actual payment over time as the actual tax obligation is recognized. As such, Order No. 144 does not address whether a tax allowance should be permitted; rather it addresses how the allowance is to be administered

30. Order No. 144 thus addresses the normalizing of the income that members or partners of LLCs receive from the pass-through utility. Under *City of Charlottesville* this is entirely compatible with the "actual taxes paid" principle, as that principle was modified and limited in that case.<sup>47</sup> The flow-through of a tax allowance to members or partners of an LLC is therefore consistent with the principle of cost causation, since it is the public utility income that gives rise to the actual or potential income tax liability, and it is the ratepayers who provide the public utility income, thus causing the actual or potential income tax liability. In short, intervenors' "actual taxes paid" and cost-causation arguments fail to recognize that it is the income from a pass-through public utility, such as an LLC, that gives rise to actual or potential income tax liability. The tax allowance acknowledges that actual or potential liability and ensures that those who are subject to that liability include the relevant public utility income in their income tax calculations.

31. In *Trans-Elect* the Commission found that NTD Path 15 had demonstrated that its owners have an actual or potential income tax liability associated with their imputed share of NTD Path 15's income.<sup>48</sup> Intervenor's do not dispute this finding. As NTD Path 15 has met the prerequisites for a tax allowance, we will, in accordance with the Policy

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<sup>46</sup> *Policy Statement* at PP 37, 40 ("income tax allowance should be afforded all jurisdictional entities, provided that the owners of pass-through entities have an actual *or* potential income tax liability" (emphasis added)).

<sup>47</sup> See *City of Charlottesville*, 774 F. 2d at 1215.

<sup>48</sup> *Trans-Elect*, 113 FERC ¶ 61,162 at P 15.

Statement, affirm our prior permission for NTD Path 15 to include a tax allowance in its revenue requirement to facilitate the important public utility investment that NTD Path 15 has made in the Path 15 upgrade.<sup>49</sup>

The Commission orders:

The request for rehearing is hereby denied.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.

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<sup>49</sup> See Policy Statement, 111 FERC ¶ 61,139 at P 37.